APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED AUGUST 4, 2008

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-4323

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY STEWART,

Defendant-Appellant.

Argued Sept. 18, 2007

Decided Aug. 4, 2008

Before EVANS, WILLIAMS, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Defendant Timothy Stewart was found guilty of robbing a bank in Evansville, Indiana, and using a firearm in connection with that crime. He was sentenced to 159 months in prison. On his initial appeal to this court, he argued that his videotaped confession, played for the jury at trial, was the product of a sequential

method of interrogation in which *Miranda* warnings were withheld until after he made an inculpatory statement, in violation of the Supreme Court's holding in *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). We remanded to the district court for findings on whether the police had deliberately used a two-step interrogation technique designed to circumvent the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). When the case returned to this court, we again remanded to the district court for more particularized findings on whether the interrogating officer intentionally withheld *Miranda* warnings as part of a question—first, warn—later strategy. On the second remand, the district court specifically credited the officer's explanation for belatedly delivering *Miranda* warnings and found that the officer had not engaged in a deliberate circumvention of *Miranda*.

We affirm. Whether the interrogating officer deliberately withheld *Miranda* warnings as part of a two-step interrogation process designed to elicit an unwarned confession is a question of fact that we review for clear error. The district court's supplemental findings were not clearly erroneous, and therefore the admission of Stewart's postwarning confession was not improper under *Seibert*. We also agree with the district court that the inculpatory statement Stewart made before being *Mirandized* was voluntary. Accordingly, although inadmissible (and not admitted) at trial, Stewart's unwarned, first statement did not affect the admissibility of his second, fully warned and voluntary confession. *See Oregon v. Elstad*, 470 U.S. 298, 314, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

Appendix A

I. Background

The background facts of this case were laid out in substantial detail in our earlier decision in this case, *United States v. Stewart* (" *Stewart I*"), 388 F.3d 1079 (7th Cir.2004), and need only be summarized here. Stewart was detained at a perimeter checkpoint established by the Evansville Police Department following an armed robbery at the Old National Bank. The officer running the checkpoint believed Stewart matched a general description of the robber given to the dispatcher by another officer who observed a black man running away from the scene of the crime carrying a rifle and a duffel bag.

Evansville Detectives Larry Nelson and Dan Winters arrived at the checkpoint shortly after Stewart was detained. Winters removed Stewart's handcuffs. Stewart, unprompted, then suggested they get in the detectives' squad car; once in the car, he told Winters to "drive" and "take me downtown." Winters stayed put. A few minutes later Nelson received information that Stewart's cell phone was found near the bank robber's abandoned getaway car. Winters then rehandcuffed Stewart, and the detectives took him downtown to the police station. During the short trip to the station, Nelson asked Stewart if he was the bank robber; Stewart denied any involvement. Stewart was not given *Miranda* warnings at this time, although the parties agreed in the initial appeal of this case that he was now in custody.

Appendix A

At the station the detectives removed Stewart's handcuffs, placed him in an interview room, and asked again whether he was involved in the robbery. Stewart told them that another man, Duel Felders, committed the robbery and that he (Stewart) provided Felders with the gun and car. Winters and Nelson then left the interview room to put out a "BOL" ("Be on Lookout") for Felders. Nelson met two FBI agents in the hallway who accompanied him back into the interview room. The agents identified themselves and Stewart began to cry. Nelson asked him if he committed the robbery. Stewart admitted doing so and said that he did it alone. At that point Nelson administered *Miranda* warnings and Stewart signed a *Miranda* waiver form. He then gave a detailed videotaped confession, which was played for the jury at trial over the objection of his counsel. (As required by *Miranda*, Stewart's unwarned statement was excluded.) The jury returned a verdict of guilty.

Stewart appealed, arguing that his videotaped confession was involuntary and the product of a question—first, warn—later interrogation technique in violation of the Supreme Court's intervening decision in *Seibert*. We agreed with the district court that Stewart's post- *Miranda* confession was voluntary, but concluded there was insufficient evidence on the question of whether the officers deliberately employed a two-step interrogation process in circumvention of *Miranda*. We remanded the case to the district court for further factfinding on this point.

On remand the district court again found Stewart's pre-and post-*Miranda* statements voluntary. The court further held that the detectives did not violate *Seibert* because the Evansville Police Department did not have an official policy directing officers to use a two-step interrogation technique and did not train its officers to question suspects in this fashion. Stewart again appealed. We declined to reconsider our prior holding affirming the district court's voluntariness finding as to Stewart's postwarning confession and again remanded the case to the district court for more specific findings on the question whether the *interrogating officer* had deliberately engaged in an end-run around *Miranda*. (On the first remand, the district court had focused solely on the Police Department's lack of a policy or training practice regarding two-step interrogations.) We directed the district court to make findings on "the explanation given by the officer for the failure to administer warnings in a timely fashion and the credibility of that explanation in light of the totality of relevant circumstances surrounding the interrogation." *United States v. Stewart* ("*Stewart II*"), 191 Fed.Appx. 495, 498-99 (7th Cir.2006).

The district court then made supplemental findings of fact and conclusions of law in response to our order in *Stewart II*. After reexamining Detective Nelson's testimony, the court accepted his explanation for failing to *Mirandize* Stewart earlier in the interrogation. Nelson testified that he did not think Stewart was in custody until he told the officer he provided a gun and a car to Felders. Stewart had himself asked to be taken

downtown to the police station, which Nelson construed as a voluntary encounter, not custody. Nelson also testified that he did not deliver *Miranda* warnings immediately after Stewart implicated himself as an accomplice to Felders because he was in a rush to get out a BOL on Felders. The court credited these explanations and reaffirmed its prior holding. Stewart appealed for a third time.

II. Discussion

In *Seibert*, the Supreme Court considered the question of the admissibility of a confession obtained by a two-step interrogation process in which *Miranda* warnings were delivered mid-interrogation, after an initial and unwarned inculpatory statement by the suspect. The Court did not, however, achieve a majority opinion regarding how such sequential interrogations ought to be evaluated. Previously, the admissibility of a postwarning confession obtained after an earlier, unwarned inculpatory statement was governed by *Elstad*, which required an inquiry into whether the pre- and postwarning statements were voluntary. 470 U.S. at 310-11, 105 S.Ct. 1285. If the unwarned, first statement was voluntary, then the second statement would be admissible under *Elstad* provided it, too, was voluntary and obtained after compliance with *Miranda*. *Id.* at 318, 105 S.Ct. 1285. If the unwarned, first statement was involuntary, however, the admissibility of the second, warned statement would depend upon whether there was a sufficient separation in time and circumstances between the first and second statements so the coercive taint of the first did not carry over to the second. *Id.* at 310, 105 S.Ct. 1285.

Seibert altered *Elstad*'s approach to sequential interrogations, at least in certain respects. In *Stewart I*, we traced the *Seibert* plurality opinion and the concurrences of Justices Breyer and Kennedy and concluded that "at least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been replaced by a presumptive rule of exclusion." *Stewart I*, 388 F.3d at 1090. Reconciling Justice Kennedy's concurrence with the plurality opinion, we concluded that in cases *not* involving the *deliberate* use of a two-step interrogation, " *Elstad* appears to have survived *Seibert*." *Id.* Justice Kennedy's concurrence, however, did not address the burden of proof or standard of review applicable to the determination of deliberateness; we turn to those threshold matters before taking up the substance of the district court's supplemental findings.

A. Burden of Proof

The government bears the burden of demonstrating the admissibility of a confession. *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). This requires the government to prove by a preponderance of the evidence the defendant's *Miranda* waiver and the voluntariness of the confession. *Seibert*, 542 U.S. at 608 n. 1, 124 S.Ct. 2601 (citing *Colorado v. Connelly*, 479 U.S. 157, 169, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), and *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)). Whether the police

deliberately used a two-step interrogation method designed to circumvent *Miranda* is a factual inquiry that bears upon the admissibility of the defendant's confession. Accordingly, where the defendant's confession was obtained during a sequential interrogation with *Miranda* warnings delivered midstream, the government bears the burden of proving the police did *not* deliberately withhold the warnings until after they had an initial inculpatory statement in hand. *See United States v. Ollie*, 442 F.3d 1135, 1142-43 (8th Cir.2006) (finding that the government must prove lack of deliberateness by a preponderance of the evidence because "[p]lacing that burden on the prosecution is consistent with prior Supreme Court decisions that require the government to prove the admissibility of a confession before it may come into evidence").

B. Standard of Review

There is not yet a general consensus among the circuits about the standard of review that applies to *Seibert*-deliberateness determinations, but the trend appears to be in the direction of review for clear error. *See United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir.2007) (applying clear-error standard of review); *United States v. Narvaez-Gomez*, 489 F.3d 970, 974 (9th Cir.2007) (applying clear-error standard of review); *United States v. Carter*, 489 F.3d 528, 536 (2d Cir.2007) (without deciding the matter, appearing implicitly to apply de novo review); *United States v. Nunez-Sanchez*, 478 F.3d 663, 668-69 (5th Cir.2007) (without deciding the

matter, appearing implicitly to apply clear-error review); *United States v. Street*, 472 F.3d 1298, 1314 (11th Cir.2006) (without deciding the matter, appearing implicitly to apply de novo review); *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir.2005) (applying clear-error standard of review); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir.2005) (applying clear-error standard of review).

A district court's decision to admit a confession is ordinarily reviewed under a split standard of review: legal issues and the "ultimate question of whether a confession is voluntary" are subject to de novo review, but the district court's underlying factual findings (including whether the defendant's *Miranda* waiver was voluntary) are reviewed for clear error, "especially when the suppression decision turn[s] on the credibility of the witnesses." *United States v. Walker*, 272 F.3d 407, 411-12 (7th Cir.2001). The question of whether the interrogating officer deliberately withheld *Miranda* warnings will invariably turn on the credibility of the officer's testimony in light of the totality of the circumstances surrounding the interrogation. This is a factual finding entitled to deference on appeal; we will apply the clear-error standard of review.

"We generally defer to the district court's determination of credibility because, unlike our review of transcripts, the district court had the opportunity to listen to testimony and observe the demeanor of witnesses at the suppression hearing." *United States v. Biggs*, 491 F.3d 616, 621 (7th Cir.2007) (internal quotation

marks omitted). In this context, the clear-error standard is especially difficult to surmount; we will accept the district court's credibility finding "unless it is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *United States v. Huebner*, 356 F.3d 807, 813 (7th Cir.2004) (internal quotation marks omitted). Stated differently, "determinations of witness credibility can virtually never be clear error." *Biggs*, 491 F.3d at 621 (internal quotation marks omitted).

C. The District Court's Supplemental Findings

Stewart argues as a general matter that in a custodial interrogation, a police officer's deferral of *Miranda* warnings until after the suspect makes an incriminating statement should always give rise to an inference of deliberateness. For support he cites the Ninth Circuit's decision in *United States v. Williams*, 435 F.3d 1148, 1160 (9th Cir.2006), but that case does not help him here. In *Williams*, the Ninth Circuit analyzed the split opinions in *Seibert* and observed that once a suspect is in custody and subjected to interrogation, "there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed." 435 F.3d at 1159. "Instead," the court noted, "the most plausible reason for the delay is an *illegitimate* one, which is the interrogator's desire to weaken the warning's effectiveness." *Id.* The Ninth Circuit went on to hold, however, that "[t]he court should consider any objective evidence or available expressions of subjective intent" to determine whether "the officer

acted deliberately to undermine and obscure the warning's meaning and effect." *Id.* at 1160. Justice Kennedy's concurrence in *Seibert* suggested a number of plausible reasons why an officer might legitimately wait to deliver *Miranda* warnings, including that "[a]n officer may not realize that a suspect is in custody and warnings are required." *Seibert*, 542 U.S. at 620, 124 S.Ct. 2601 (Kennedy, J., concurring). Indeed, that was the officer's explanation here, and the district court found it credible.

Stewart attacks Nelson's testimony as inherently incredible. He argues that Nelson's explanation for deferring *Miranda* warnings—that he mistakenly believed Stewart was not in custody until he implicated Felders, with himself as an accomplice—is simply unworthy of belief. But "the task of defining custody is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." *Elstad*, 470 U.S. at 309, 105 S.Ct. 1285 (internal quotation marks & brackets omitted). The point at which a suspect is in custody is determined objectively—a suspect is in custody when a reasonable person in the suspect's circumstances would not have felt free to leave. *United States v. Thompson*, 496 F.3d 807, 810-11 (7th Cir.2007). The subjective belief of the officers involved is generally irrelevant. *Stansbury v. California*, 511 U.S. 318, 323-24, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). In this context, however, Nelson's subjective belief about Stewart's custodial status *is* relevant to the evaluation of his reasons for deferring *Miranda* warnings. Although we held in *Stewart I* (and

the parties agreed on appeal) that Stewart was in custody when Winters rehandcuffed him at the checkpoint and the detectives took him to the police station, the district court was entitled to credit Nelson's contrary, though mistaken, subjective belief.

In this regard, Stewart also maintains the district court misinterpreted the import of his demand to "take me downtown." He argues Nelson could not reasonably have believed this made his trip to the police station a voluntary encounter. When Stewart made this demand, however, he was not handcuffed and had himself suggested to Winters, "Let's get in your car." In initially denying Stewart's suppression motion, the district court had concluded that Stewart was not in custody at the checkpoint. In *Stewart I*, we disagreed, but the court was entitled on remand to credit Nelson's explanation that he waited to give *Miranda* warnings because he mistakenly believed Stewart was accompanying the officers voluntarily.

Stewart also attacks Nelson's failure to give *Miranda* warnings at an earlier point during the interrogation at the station house—immediately after he incriminated himself as an accomplice to Felders. Nelson acknowledged that he knew, at this point, that the warnings were required, and Stewart suggests that the failure to immediately provide them suggests that they were deliberately withheld. The district court accepted Nelson's explanation that he failed to deliver the warnings at this point in the interrogation in his rush to get a BOL out on Felders and because of his

subsequent encounter with the FBI agents in the hall. Nelson said: "[W]hen I came back in the room, by that time the FBI was coming in the room, and they started talking to him." He also testified: "When I came back in the room, of course, the agents came in and identified themselves, so I'm sure that had something to do with it, but it's still my error."

Stewart's counsel suggested at oral argument that Nelson did not leave the interview room to get information out on Felders but instead to tell the arriving FBI agents that Stewart was about to "break." Nothing in the record supports this assertion. Special Agent Williams testified that Detective Winters first came into the hall to inform him of the information on Felders; then "Detective Larry Nelson exited the same interview room and came out and indicated that—basically the same information that Detective Winters had indicated." Agent Williams testified that he and Special Agent Beck then went into the interview room to question Stewart along with Nelson, and at that point Stewart began to cry and admitted committing the robbery. This corroborates Nelson's explanation. The existence of a plausible alternative explanation—that Nelson deliberately withheld *Miranda* warnings because he wanted to capitalize on Stewart's weakened emotional state—does not itself undermine the district court's credibility determination. The court did not clearly err in accepting Nelson's explanation for delaying the *Miranda* warnings.

Stewart raises two additional challenges to the district court's deliberateness findings. First, he contends the district court applied an incorrect legal standard when it considered the degree of overlap between his pre- and post- *Miranda* confessions in analyzing whether the two-step interrogation method was deliberately employed. The district court noted that "the content of the pre- and post- *Miranda* statements did not overlap"—Stewart's pre-warning statement was limited to his admission that he committed the robbery alone, and his postwarning statement was not just a repetition of the first but contained far more detail.

For the *Seibert* plurality, the degree of overlap between pre- and post- *Miranda* statements bears upon the question whether " *Miranda* warnings delivered midstream could be effective enough to accomplish their object." *Seibert*, 542 U.S. at 615, 124 S.Ct. 2601. For Justice Kennedy, an inquiry into the differences in time and circumstances between the first and second statement is necessary only when the interrogating officer uses a "deliberate two-step strategy, predicated upon violating *Miranda* during an extended interview." *Id.* at 621, 124 S.Ct. 2601 (Kennedy, J., concurring). "If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Id.* at 622, 124 S.Ct. 2601. Justice Kennedy suggested that a "substantial break in time and circumstances" between the two statements "may suffice" as adequate curative measures "in most circumstances." *Id.*

Here, the district court cited the relative lack of overlap between Stewart's pre- and post- *Miranda* statements as objective evidence that Detective Nelson had not deliberately used a two-step interrogation strategy—*not* as in the *Seibert* plurality, as a measure of the effectiveness of midstream *Miranda* warnings or, as in Justice Kennedy's concurrence, to evaluate whether sufficient "curative measures" were proven. Nevertheless, the district court's approach was not error. The *Seibert* plurality noted that the point of using a two-step process "is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble." *Id.* at 613, 124 S.Ct. 2601. Conversely, the lack of overlap between the warned and unwarned statements is evidence that the interrogator did not deliberately use a two-step strategy designed to circumvent *Miranda.*

Stewart also argues the district court's failure to consider Detective Winters's reasons for omitting *Miranda* warnings was error. We disagree. The court's factual findings establish that Nelson was the lead detective and that Winters's involvement in the actual interrogation was collateral. Nelson confronted Stewart with information about the cell phone found at the scene. Nelson questioned Stewart during the short ride to the police station and initially in the interrogation room. After Winters left the interrogation room, Nelson asked the question that elicited Stewart's initial admission to committing the robbery alone, and Nelson subsequently advised Stewart of his rights and obtained a *Miranda* waiver. Under cross-examination by Stewart's counsel,

Winters testified explicitly that "Detective Nelson was the lead investigator on this."

The determination of whether a question—first strategy was deliberately used does not require an inquiry into the state of mind of *every* officer involved in the interrogation. It is enough here that the district court credited Detective Nelson's reasons for omitting *Miranda* warnings. He was the lead investigator and was responsible for the bulk of the interrogation. That Detective Winters played only a supportive role in the interrogation is borne out by the record; the absence of any inquiry into his reasons for omitting *Miranda* warnings does not undermine the district court's acceptance of Nelson's explanation.

D. Voluntariness of Stewart's Pre- *Miranda* Statement

Finally, Stewart argues that his pre- *Miranda* statement was involuntary and that the coercive taint carried over to his post- *Miranda* statement, making it inadmissible under *Elstad*. In *Stewart I*, we affirmed the district court's conclusion that Stewart's postwarning confession was voluntary and remanded for findings on whether the police deliberately used a two-step interrogation process designed to circumvent *Miranda*, and if so, for a further inquiry into the sufficiency of the separation in time and circumstances between the warned and unwarned confessions. 388 F.3d at 1091-92. Our remand instructions also told the district court that if it found that the interrogation process used

here was *not* a deliberate end run around *Miranda*, it should determine "whether the initial unwarned confession would flunk the voluntariness standard of *Elstad* such that the taint would carry over to the second warned confession." *Id.* at 1091. The district court found "no evidence of any coercive police activity relative to [Stewart's] pre- *Miranda* statement."

Stewart points to the fact that he began to cry when the FBI agents entered the interrogation room and argues that this undercuts the district court's voluntariness finding. His emotional reaction to the entry of the FBI into the investigation is hardly evidence of coercive interrogation tactics and does not by itself call into question the voluntariness of his pre- *Miranda* statement. The voluntariness inquiry asks whether the confession is "the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will." *United States v. Gillaum*, 372 F.3d 848, 856 (7th Cir.2004) (internal quotation marks omitted). We agree with the district court that there is no evidence of any form of police coercion at work here. Stewart's *Mirandized* and voluntary videotaped confession was properly admitted at trial.

AFFIRMED.

APPENDIX B — SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION DATED DECEMBER 7, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 01-32-CR-01-Y/H

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY STEWART,

Defendant.

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

On November 9, 2004, the Seventh Circuit issued its opinion regarding the admissibility of defendant Timothy Stewart's confession. The Court found that Defendant's post-*Miranda*[1] confession was voluntary, but remanded the case to this court to determine whether his pre-*Miranda* confession was voluntary in

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

light of the Supreme Court's decision in *Missouri v. Seibert*, 124 S.Ct. 2601 (2004). Following an evidentiary hearing, on June 25, 2005, the court issued its Findings of Fact and Conclusions of Law, concluding that Defendant's pre-*Miranda* confession was voluntary and not a deliberate end run around *Miranda*.

Following an appeal of the court's Findings of Fact and Conclusions of Law, the Seventh Circuit, in an unpublished order, vacated the court's decision and directed the court to focus "on the explanation given by [Detective Nelson] for the failure to administer warnings in a timely fashion and the credibility of that explanation in light of the totality of the circumstances surrounding the interrogation." Pursuant to the Seventh Circuit's mandate, the court now issues its supplemental Findings of Fact and Conclusions of Law. For simplicity's sake, the court copied its June 25, 2005 findings and conclusion and inserted the supplemental findings and conclusions therein. The supplemental findings and conclusions are identified alphanumerically as Finding of Fact # 23a and Conclusion of Law ## 12a-e.

I. SUPPLEMENTAL FINDINGS OF FACT

1. On October 25, 2001, at approximately 9:30 a.m., the Old National Bank, located at 1925 Lincoln Avenue, Evansville, Indiana, was robbed by a man dressed in black, wearing gloves and a skeleton mask, and carrying an SKS rifle and a duffel bag.

2. In response to a police dispatch, Officer Michael Sitzman ("Sitzman") of the Evansville Police Department ("EPD") drove his vehicle near the scene of the robbery and observed a man carrying a rifle and a duffel bag run from the bank toward a fence. The man threw the rifle down, jumped over the fence, and disappeared.

3. Sitzman provided a general description of the man to the dispatcher.

4. EPD Corporal Timothy Nussmeier ("Nussmeier") set up a perimeter a few blocks from the bank and was checking vehicles for individuals matching the description of the suspect.

5. While at the perimeter, Nussmeier stopped a vehicle in which Defendant was a passenger. Nussmeier radioed for an eyewitness identification. Sitzman arrived at the perimeter checkpoint soon thereafter.

6. After Sitzman viewed Defendant, Nussmeier radioed for the assistance of EPD detectives to come to his location. Nussmeier then handcuffed Defendant and placed him in the back seat of his vehicle, where Defendant remained for five or ten minutes.

7. Detective Larry Nelson ("Nelson") and Detective Dan Winters ("Winters") arrived at

Nussmeier's location at approximately 10:30 a.m. in an unmarked police car driven by Nelson.

8. Nelson and Winters spoke to Nussmeier for several minutes.

9. Winters removed Defendant from the back seat of Nussmeier's police car and uncuffed him.

10. Defendant said, "Let's get in your [Winters'] car." Defendant got into the back seat of the detectives' car and Winters entered the front seat. Winters asked Defendant routine identity questions, such as his name and date of birth.

11. Defendant then said, "Drive, take me downtown." Winters responded, "No." Defendant said, "You are going to arrest me anyway." Winters said, "Why, are you the bank robber?" Defendant said, "No."

12. Nelson, who was at the driver's side of the detectives' car, was approached by EPD Detective James Myers, who told him of a cellular telephone he had recovered near the robber's abandoned getaway car and provided the telephone number he had observed on the cellular telephone's caller identification display. Nelson contacted the police dispatcher and requested the subscriber information for the telephone number. Several minutes later, the dispatcher informed Nelson, who was now

seated in the driver's seat of the detectives' car, that the telephone number was owned by one Timothy Stewart of 4000 Kathleen Street.

13. Nelson then turned to Defendant, asked if he had committed the robbery, stated that the police had a cellular telephone with his telephone number on it, and asked if it was his address and telephone number. Defendant answered, "take me downtown."

14. Winters removed Defendant from the back seat of the detectives' car, handcuffed him, and returned him to the back seat of the detectives' car.

15. Nelson did not consider Defendant to be in custody at this time due to the fact that Defendant asked to enter the detectives' car and had demanded to be taken to the police station.

16. Nelson then drove Winters and Defendant in the detectives' car to the EPD. During the short drive, Nelson asked Defendant one or two times if he committed the robbery. Defendant denied having committed the robbery.

17. Once they arrived at the EPD, Nelson and Winters took Defendant to an interview room and removed his handcuffs.

18. Nelson and Winters again asked Defendant if he was involved in the robbery. Defendant denied involvement in the robbery, but asked if he would be charged if he told them who had committed the robbery.

19. Nelson told him that if he had no direct involvement in the robbery, he would not be charged and would be allowed to go home. Defendant responded that Duel Felders ("Felders") had committed the robbery. Soon thereafter, Defendant stated that he had provided Felders with a firearm and a car for Felders' use during the commission of the robbery.

20. Nelson confronted him with the fact that a cellular telephone bearing his number on the caller ID had been found at the robbery scene. He asked him how it got there. Defendant responded that Felders left it there.

21. At the March 18 evidentiary hearing of this matter, Nelson admitted that he should have advised Defendant of his *Miranda* rights at this point, but failed to do so. Nelson attributed the mistake to being in a rush to look up information on Felders.

22. About five or ten minutes into the interview, Winters left the interview room. Special Agent Martin Williams ("Williams") and Special Agent

James Beck ("Beck") of the Federal Bureau of Investigation ("FBI") were outside of the interview room.

23. Williams and Beck joined Nelson and Stewart in the interview room. Shortly thereafter, Defendant broke down in tears and admitted to committing the robbery.

23a. Nelson asked Defendant if he committed the robbery and if he committed it alone. Defendant responded in the affirmative.

24. Nelson then advised Defendant of his *Miranda* rights pursuant to EPD policy. [2]

25. At approximately 11:05 a.m., Defendant executed a waiver of his *Miranda* rights.

26. Williams and Nelson then interviewed Defendant for over an hour.

27. Defendant agreed to give a tape-recorded statement. The statement began at 12:10 p.m., October 25, 2001, and concluded at 12:39 p.m.

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2. EPD Standard Operating Procedure Number 144.00, Constitutional Requirements During Criminal Investigations, provides that "[s]uspects in custody must be advised of their constitutional rights *(Miranda rights)* prior to being asked any incriminating questions." Government's Ex. 1.

28. This recorded statement and a transcription thereof were admitted into evidence over objection at Defendant's trial, as Government's Exhibits 51 and 52, respectively.

29. The post-*Miranda* statement given by Defendant provided greater detail as to how he planned and committed the robbery than his pre-*Miranda* statement.

30. At no time did Defendant appear to be under the influence of drugs or alcohol during the course of his dealings with investigators.

II. SUPPLEMENTAL CONCLUSIONS OF LAW

1. To the extent any of the foregoing findings of fact is a conclusion of law, it is hereby adopted as a conclusion of law. To the extent any of the conclusions of law set forth below is a finding of fact, it is hereby adopted as a finding of fact.

2. "The [Government] bears the burden of proving, at least by a preponderance of the evidence, the voluntariness of the *Miranda* waiver, *Colorado v. Connelly*, 479 U.S. 157, 169 (1986), and the voluntariness of the confession. *Lego v. Twomey*, 404 U.S. 477, 489 (1972)," *Seibert*, 124 S.Ct. at 2608 n.1. The court therefore concludes that the Government must also prove, by a preponderance of the evidence, that Defendant's interrogation was not an end run around *Miranda*.

3. It is well-settled law that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards[3] effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

4. A person is "in custody" when his or her freedom of movement is restricted to the degree commensurate with a formal arrest. *United States v. Abdulla*, 294 F.3d 830, 834 (7th Cir. 2002) (citing *United States v. Yusuff*, 96 F.3d 982, 987 (7th Cir. 1996)). During the oral argument before the Seventh Circuit, the Government conceded that at the time that Winters handcuffed Defendant and placed him in the back of the detectives' car, *see* Finding of Fact # 14, Defendant was in custody. *United States v. Stewart*, 388 F.3d 1079, 1082 (7th Cir. 2004).

5. The term "interrogation" means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Abdulla*, 294 F.3d at 834 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)).

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3. The procedural safeguards referenced above are the familiar *Miranda* warnings.

6. *In Oregon v. Elstad*, 105 S.Ct. 1285 (1985), the Supreme Court held that the failure to administer *Miranda* warnings prior to the defendant's initial inculpatory statement did not require the suppression of his subsequent *Mirandized* statement:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely to whether it is knowingly and voluntarily made.

Id. at 1293.

7. More recently, *in Missouri v. Seibert*, I24 S.Ct. 2601 (2004), the Supreme Court "addressed the admissibility of a two-step interrogation strategy that called for the deliberate withholding *of Miranda* warnings until the suspect confessed, followed by *a Miranda* warning and a repetition of the confession already given." *Stewart*, 388 F.3d at 1086.

8. In *Seibert*, the officer who arrested the defendant purposely did not advise her of her *Miranda* rights. The defendant was then transported to the police station where another officer questioned the defendant for approximately 30-40 minutes without advising her of her *Miranda* rights. *Seibert*, 124 S.Ct. at 2606. After the defendant made incriminating statements, she was given a 20-minute break. *Id.*

   Following the break, the officer advised the defendant of her *Miranda* rights and she executed a written waiver of her rights. *Id.* The defendant then made a statement during which the officer confronted her with her pre-Miranda statements. *Id.* The defendant's post-Miranda statement was "largely a repeat of information . . . obtained" in the *pre-Miranda* statement. *Id.* (quoting the record on appeal). At the hearing on the motion to suppress the defendant's pre- and post-*Miranda* statements, the officer testified that he made "'a conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught question first, then give the *[Miranda]* warnings, and then repeat the question 'until I get the answer that she's already provided once.' *Id.* (quoting the record on appeal). In concluding that the defendant's post-*Miranda* statements were inadmissible under these circumstances, a plurality of the

Court found that "the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted," and that the facts did "not reasonably support a conclusion that the *[Miranda]* warnings given could have served their purpose." *Id.* at 2613.

9. Although a plurality of the Court found the defendant's post-Miranda statement inadmissible, *Seibert* did not produce a majority opinion. *Stewart*, 388 F.3d at 1086.

10. In *Stewart*, the Seventh Circuit analyzed the various concurring opinions comprising the plurality to determine *Seibert's* holding. *Id.* at 1086-90. This analysis revealed the following holding: "At least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second." *Id.* at 1090. Under the multifactor test, the court must examine the "completeness and detail of the questions and answers" in the pre-*Miranda* statement, the "overlapping content" of the pre- and post-*Miranda* statements, the "continuity of police personnel," and the degree to which the interrogator's questions treated the post-

Miranda statement as continuous with the pre-*Miranda* statement, to determine whether the pre- and post-*Miranda* statements were sufficiently separated for the *Miranda* warnings to have effectively informed the defendant of his constitutional rights. *Seibert*, 124 S.Ct. at 2610, 2612; *Stewart*, 388 F.3d at 1090.

11. The Seventh Circuit's analysis also indicated that "[w]here the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*." *Stewart*, 388 F.3d at 1090. Thus, if the pre-*Miranda* statement was voluntary, admission of the post-*Miranda* statement "depends only on whether it, too, was voluntary, and obtained in compliance with *Miranda*." *Id.* at 1088.

12. The court finds that the Government has met its burden of proving, by a preponderance of the evidence, that the interrogation technique employed by the EPD was not a deliberate end run around *Miranda*. There is no evidence that the EPD has ever had a policy which employs the two-step interrogation technique, nor evidence that the EPD has ever trained or instructed their officers to employ such a technique.

12a. Although Nelson conducted the pre-*Miranda* interrogations, initially with the assistance of

Winters and later Williams and Beck, and the post-*Miranda* interrogation, the content of the pre- and post-*Miranda* statements did not overlap. Defendant's pre-Miranda statement essentially consisted of Defendant admitting to the commission of the robbery, and doing it alone. Defendant's post-*Miranda* oral and tape-recorded statements covered far more than that, *see* Government's Exhibits 51-52, and were not "largely a repeat of information . . . obtained" in the pre-*Miranda* statement. *Seibert*, 124 S.Ct. at 2606.

12b. Nelson's questioning of Defendant was not a deliberate end run around *Miranda*. Nelson believed that Defendant was not in custody until Defendant stated that he had provided Felders with a gun and a car to use in the commission of the robbery. This belief is credible in light of Defendant's request to enter the detectives' car at Nussmeier's location and his demand to be driven to the police station. Although Nelson suspected that Defendant was either involved in the robbery or knew who was involved, he did not believe that the presence of Defendant's telephone number on the caller identification display on the cellular telephone found near the abandoned getaway car established probable cause to believe that Defendant had participated in the robbery.

12c. Nelson's opinions regarding Defendant's custodial status are also credible in light of the court's prior written findings that Defendant was not in custody until his statement regarding Felders at the EPD, as he voluntarily requested that Nelson and Winters take him to the police station.

12d. Nelson's pre-*Miranda* questioning of Defendant is not indicative of a deliberate attempt to circumvent *Miranda*. Unlike the officer implicated in *Siebert*, there is no evidence in the record that Nelson made a conscious decision to elicit a confession from Defendant without first advising Defendant of the legally-required *Miranda* warnings. In fact, the evidence reflects that Nelson failed to *Mirandize* Defendant once he considered him to be in custody because he was in "too big of a rush to get out and get the information out on Duel Felters (*sic*)." Nelson's testimony that his failure to advise Defendant was the result of his rush to advance the investigation, and not a deliberate attempt to violate Defendant's rights, is credible.

12e. The court therefore finds that the sequential interrogation process utilized in this case was not used in circumvention *of Miranda*.

13. In keeping with the Seventh Circuit's interpretation *of Seibert*, the court must determine whether Defendant's pre- and post-*Miranda* statements were voluntary.

14. "[A] confession is voluntary if, in light of the totality of the circumstances, the confession is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will." *Abdulla*, 294 F.3d at 836. Further, "coercive police activity is a necessary predicate to the finding that a confession is not voluntary." *Id.*

15. There is no evidence of any coercive police activity relative to Defendant's pre-*Miranda* statement. There is no evidence that he was threatened in any way by the police officers nor is there evidence that anyone made any promises to the Defendant in exchange for speaking with the officers. The court therefore finds, in light of the totality of the circumstances, that Defendant's pre-Miranda statement was voluntary.

16. Defendant's post-*Miranda* statement was likewise voluntary. *Stewart*, 388 F.3d at 1092. He executed a written waiver of his *Miranda* rights, which informed him of his right to remain silent, his right to an attorney, his right to exercise his right to remain silent at any time during the interrogation process, and the possible use of his testimony against him at trial. Nelson testified that he read these rights to the Defendant and that he appeared to understand

them. Defendant did not ask Nelson for clarification of the waiver provision or of his constitutional rights.

17. For these reasons, the court finds that the interrogation of Defendant was not a deliberate end run around *Miranda*, that Defendant's pre-*Miranda* statement was voluntary in accordance with *Elstad*, and that Defendant's post-*Miranda* statement was taken in compliance with *Miranda*.

SO ORDERED this 7 day of December 2006.

s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED AUGUST 25, 2006

UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

No. 05-2988

UNITED STATES of America,

Plaintiff-Appellee,

v.

Timothy L. STEWART,

Defendant-Appellant.

Argued May 31, 2006
Decided Aug. 25, 2006

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division. No. EV 01-32-CR-01-Y/H. Richard L. Young, Judge.

Before Hon. TERENCE T. EVANS, Circuit Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge,

Hon. DIANE S. SYKES, Circuit Judge.

Appendix C

ORDER

Timothy Stewart appeals the district court's conclusion that a confession he made to law enforcement officials was admissible at his trial for armed bank robbery. Stewart's confession was elicited during a so-called "two-step" or "question first, warn later" interrogation. This type of interrogation occurs when a suspect in custody is initially questioned without the benefit of a *Miranda*[1] warning, makes inculpatory statements, and is thereupon given appropriate warnings and confirms his earlier, unwarned statements.

This is the second time we have reviewed the admissibility of Stewart's confession. In our first decision we remanded the issue to the district court for consideration of whether, in light of the Supreme Court's plurality opinion in *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), the two-step interrogation process was employed by the officers in this case in a deliberate attempt to circumvent the requirements of *Miranda*. *United States v. Stewart*, 388 F.3d 1079 (7th Cir.2004). On remand, the district court held an evidentiary hearing and concluded that no end run around *Miranda* was intended, but the court did not support this conclusion with the factual findings we think are necessary for our review of its decision. We therefore must once again remand this case to the district court for further and more specific factfinding.

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1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Appendix C

Discussion

The facts surrounding Stewart's detention and interrogation were discussed thoroughly in our initial opinion, and we need not reiterate them here in their entirety. Stated briefly, Stewart was initially detained at a checkpoint established near the scene of an armed bank robbery in Evansville, Indiana, because he generally matched a physical description of the robber. Stewart was taken into custody shortly after he was stopped when his cell phone was found lying next to the abandoned getaway car.

Without the benefit of *Miranda* warnings, Stewart was questioned by Evansville Police Detectives Winters and Nelson during the ensuing five-minute ride to the police station and for approximately ten minutes after arrival at the station. During his pre-*Miranda* interview at the station with Detectives Winters and Nelson, Stewart first claimed that another man committed the robbery and that Stewart only provided the robber with the gun and car used in the crime.

Winters and Nelson then left Stewart alone in the interview room, and two agents from the Federal Bureau of Investigation arrived at the station. Nelson and the two federal agents reentered the room and resumed questioning Stewart, at which point Stewart admitted that he robbed the bank and acted alone. Stewart was then read his rights for the first time and signed a *Miranda* waiver form. The questioning continued uninterrupted for the next hour, and Stewart made a

tape-recorded statement in which he confirmed and elaborated upon the details of his earlier, unwarned and unrecorded confession. Over the objection of defense counsel, this tape-recorded confession was admitted into evidence at Stewart's trial. Stewart was convicted of the bank robbery and was sentenced to 159 months in prison.

Following his conviction, Stewart appealed several issues, and this panel rejected all save one. We reserved ruling on the question of whether Stewart's recorded confession was inadmissible because the two-step interrogation process was inconsistent with *Miranda* as interpreted by the plurality in *Seibert.* Using the *Marks*[2] approach to the analysis of plurality opinions, we gleaned the following rule from *Seibert:*

> [A]t least as to deliberate two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of [*Oregon v. Elstad,* 470 U.S. 298, 105

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2. In *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In *Seibert,* Justice Kennedy's opinion concurring in the judgment provided the narrowest grounds for decision and thus constitutes the holding of the Court. *See United States v. Stewart,* 388 F.3d 1079, 1090 (7th Cir.2004).

> S.Ct. 1285, 84 L.Ed.2d 222 (1985)] has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place and circumstances from the first statement to the second. . . . Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert.*

Stewart, 388 F.3d at 1090.

We then found that the record was silent as to the crucial *Seibert* inquiry-whether the "two-step interrogation in this case was deliberately used in circumvention of *Miranda*," *Id.* at 1091—and remanded the case for further proceedings. We held that subsequent factfinding by the district court was needed to answer the following questions:

> If the sequential interrogation process was used in deliberate circumvention of *Miranda* and there is insufficient separation in time and circumstances between the unwarned and warned confessions, then the warned confession was improperly admitted and Stewart's conviction cannot stand. . . . If, on the other hand, the interrogation process at work here was not a deliberate end run around *Miranda*, then Stewart's first statement must be evaluated for voluntariness under *Elstad.*

Id. at 1091-92.

Appendix C

As previously noted, the district court held an evidentiary hearing and then determined in a written opinion that Stewart's interrogation was "not an end run around *Miranda*." In support of this holding, the court stated: "There is no evidence that the [Evansville Police Department] has ever had a policy which employs the two-step interrogation technique, nor evidence that the EPD has ever trained or instructed their officers to employ such a technique." The court then went on to hold that the prewarning statement had been voluntarily made and that there was consequently no error in admission of the postwarning confession at trial.[3]

In this second round of appellate proceedings, Stewart asks us to (1) revisit our original decision concerning the proper interpretation of *Seibert* and the voluntariness of his post- *Miranda* statement and (2) find that the district court erred in concluding that the Evansville police did not intentionally withhold warnings in a deliberate effort to circumvent *Miranda* as a means to exact inculpatory statements. As to the first of these contentions, nothing has changed since our decision in the first appeal, and Stewart is merely trying to have a second kick at the cat on issues he lost the first time around. We therefore decline to reexamine our previous decision. *See Vidimos, Inc. v. Wysong Laser Co., Inc.*,

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3. The court also held that Stewart's post- *Miranda* statement was voluntarily made, but this issue was not one that we remanded for further consideration. To the contrary, our opinion specifically held that "we AFFIRM the district court's conclusion that Stewart's postwarning confession was voluntary . . . ." *Stewart*, 388 F.3d at 1092.

179 F.3d 1063, 1065-66 (7th Cir.1999). We proceed to a discussion of the district court's conclusion concerning the question on which we ordered a remand-whether the police in this case intentionally used the two-step interrogation in deliberate circumvention of *Miranda*.

Stewart argues, and we agree, that the district court's analysis was unduly limited to a consideration of whether the Evansville Police Department had an official *policy* endorsing two-step interrogation or provided training in which its officers were *instructed* to employ such a technique. These considerations are potentially relevant to the broader question of officer intent but by themselves are by no means dispositive of the issue. The threshold matter for determination under *Seibert* is whether the officers intentionally withheld *Miranda* warnings as part of a deliberate strategy to elicit inculpatory statements in circumvention of *Miranda;* such an interrogation strategy might be used in a given case in the absence of an official policy requiring its use.[4] Rather than concentrate exclusively on the presence or absence of a departmental policy, the primary focus of the inquiry should be on the explanation given by the officer for the failure to administer warnings in a timely fashion and the credibility of that explanation in light of the totality of relevant circumstances surrounding the interrogation.

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4. Indeed, we think it unlikely, in the wake of *Seibert* and the cases interpreting it, that a law enforcement agency would maintain an official policy that invites suppression motions under *Seibert*.

We reluctantly conclude that the district court's decision does not include the factual findings necessary for us to meaningfully review its conclusion that the interrogation in this case was not deliberately calculated to circumvent *Miranda*. Particularly conspicuous in its absence is any discussion of the credibility of Detective Nelson's testimony concerning the reasons for the failure to administer *Miranda* warnings prior to eliciting Stewart's initial confession.

Accordingly, the district court's decision is VACATED and we once again REMAND this case for more specific factfinding consistent with both this opinion and our original opinion in this case.

APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION DATED JUNE 29, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV C 1-32-CR-01-YI/H

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY STEWART,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court conducted an evidentiary hearing on March 18, 2005, in accordance with the remand from the Seventh Circuit, to determine the admissibility of Timothy Stewart's ("Defendant") statements to law enforcement officers under *Missouri v. Seibert*, 124 S.Ct. 2601 (2004). At the commencement of the hearing, this court incorporated the testimony from the hearing on the motion to suppress and from the trial of this matter.

Appendix D

The court, having heard the testimony of Evansville Police Department ("EPD") detectives involved in Defendant's interrogation, and having reviewed the relevant evidence and the applicable law, now finds that the interrogation of Defendant was not an end run around *Miranda*,[1] Defendant's pre-Miranda statement was voluntary, and Defendant's post-*Miranda* statement was voluntary. Accordingly, Defendant's post-*Miranda* tape-recorded statement was properly admitted at his trial.

The court now issues its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a):

FINDINGS OF FACT

1. On October 25, 2001, at approximately 9:30 a.m., the Old National Bank, located at 1925 Lincoln Avenue, Evansville, Indiana, was robbed by a man dressed in black, wearing gloves and a skeleton mask, and carrying an SKS rifle and a duffel bag.

2. In response to a police dispatch, Officer Michael Sitzman ("Sitzman") of the Evansville Police Department ("EPD") drove his vehicle near the scene of the robbery and observed a man carrying a rifle and a duffel bag run from the bank toward a fence. The man threw the rifle down, jumped over the fence, and disappeared.

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

3. Sitzman provided a general description of the man to the dispatcher.

4. EPD Corporal Timothy Nussmeier ("Nussmeier") set up a perimeter a few blocks from the bank and was checking vehicles for individuals matching the description of the suspect.

5. While at the perimeter, Nussmeier stopped a vehicle in which Defendant was a passenger. Nussmeier radioed for an eyewitness identification. Sitzman arrived at the perimeter checkpoint soon thereafter.

6. After Sitzman viewed Defendant, Nussmeier radioed for the assistance of EPD detectives to come to his location. Nussmeier then handcuffed Defendant and placed him in the back seat of his vehicle, where Defendant remained for five or ten minutes.

7. Detective Larry Nelson ("Nelson") and Detective Dan Winters ("Winters") arrived at Nussmeier's location at approximately 10:30 a.m. in an unmarked police car driven by Nelson.

8. Nelson and Winters spoke to Nussmeier for several minutes.

9. Winters removed Defendant from the back seat of Nussmeier's police car and uncuffed him.

10. Defendant said, "Let's get in your [Winters'] car." Defendant got into the back seat of the detectives' car and Winters entered the front seat. Winters asked Defendant routine identity questions, such as his name and date of birth.

11. Defendant then said, "Drive, take me downtown." Winters responded, "No." Defendant said, "You are going to arrest me anyway." Winters said, "Why, are you the bank robber?" Defendant said, "No."

12. Nelson, who was at the driver's side of the detectives' car, was approached by EPD Detective James Myers, who told him of a cellular telephone he had recovered near the robber's abandoned getaway car and provided the telephone number he had observed on the cellular telephone's caller identification display. Nelson contacted the police dispatcher and requested the subscriber information for the telephone number. Several minutes later, the dispatcher informed Nelson, who was now seated in the driver's seat of the detectives' car, that the telephone number was owned by one Timothy Stewart of 4000 Kathleen Street.

13. Nelson then turned to Defendant, asked if he had committed the robbery, stated that the police had a cellular telephone with his telephone number on it, and asked if it was his address and telephone number. Defendant answered, "take me downtown."

14. Winters removed Defendant from the back seat of the detectives' car, handcuffed him, and returned him to the back seat of the detectives' car.

15. Nelson did not consider Defendant to be in custody at this time due to the fact that Defendant asked to enter the detectives' car and had demanded to be taken to the police station.

16. Nelson then drove Winters and Defendant in the detectives' car to the EPD. During the short drive, Nelson asked Defendant one or two time if he committed the robbery. Defendant denied having committed the robbery.

17. Once they arrived at the EPD, Nelson and Winters took Defendant to an interview room and removed his handcuffs.

18. Nelson and Winters again asked Defendant if he was involved in the robbery. Defendant denied involvement in the robbery, but asked if he would be charged if he told them who had committed the robbery.

19. Nelson told him that if he had no direct involvement in the robbery, he would not be charged and would be allowed to go home. Defendant responded that Duel Felders ("Felders") had committed the robbery. Soon thereafter, Defendant stated that he had

provided Felders with a firearm and a car for Felders' use during the commission of the robbery.

20. Nelson confronted him with the fact that a cellular telephone bearing his number on the caller ID had been found at the robbery scene. He asked him how it got there. Defendant responded that Felders left it there.

21. At the March 18 evidentiary hearing of this matter, Nelson admitted that he should have advised Defendant of his *Miranda* rights at this point, but failed to do so. Nelson attributed the mistake to being in a rush to look up information on Felders.

22. About five or ten minutes into the interview, Winters left the interview room. Special Agent Martin Williams ("Williams") and Special Agent James Beck ("Beck") of the Federal Bureau of Investigation ("FBI") were outside of the interview room.

23. Williams and Beck joined Nelson and Stewart in the interview room. Shortly thereafter, Defendant broke down in tears and admitted to committing the robbery.

24. Nelson then advised Defendant *of his Miranda* rights pursuant to EPD policy.[2]

25. At approximately 11:45 a.m., Defendant executed a waiver of his *Miranda* rights.

26. Williams and Nelson then interviewed Defendant for over an hour.

27. Defendant agreed to give a tape-recorded statement. The statement began at 12:10 p.m., October 25, 2001, and concluded at 12:39 p.m.

28. This recorded statement and a transcription thereof were admitted into evidence over objection at Defendant's trial, as Government's Exhibits 51 and 52, respectively.

29. The post-Miranda statement given by Defendant provided greater detail as to how he planned and committed the robbery than his pre-*Miranda* statement.

30. At no time did Defendant appear to be under the influence of drugs or alcohol during the course of his dealings with investigators.

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2. EPD Standard Operating Procedure Number 144.40, Constitutional Requirements During Criminal Investigations, provides that "[s]uspects in custody must be advised of their constitutional rights (*Miranda* rights) prior to being asked any incriminating questions." Government's Ex. 1.

Appendix D

CONCLUSIONS OF LAW

1. To the extent any of the foregoing findings of fact is a conclusion of law, it is hereby adopted as a conclusion of law. To the extent any of the conclusions of law set forth below is a finding of fact, it is hereby adopted as a finding of fact.

2. "The [Government] bears the burden of proving, at least by a preponderance of the evidence, the voluntariness of the *Miranda* waiver, *Colorado v. Connelly*, 479 U.S. 157, 169 (1986), and the voluntariness of the confession. *Lego v. Twomey*, 404 U.S. 477, 489 (1972)." *Seibert*, 124 S.Ct. at 2608 n.1. The court therefore concludes that the Government must also prove, by a preponderance of the evidence, that Defendant's interrogation was not an end run around *Miranda*.

3. It is well-settled law that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards[3] effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

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3. The procedural safeguards referenced above are the familiar *Miranda* warnings.

4. A person is "in custody" when his or her freedom of movement is restricted to the degree commensurate with a formal arrest. *United States v. Abdulla*, 294 F.3d 830, 834 (7th Cir. 2002) (citing *United States v. Yusuff*, 96 F.3d 982, 987 (7th Cir. 1996)). During the oral argument before the Seventh Circuit, the Government conceded that at the time that Winters handcuffed Defendant and placed him in the back of the detectives' car, *see* Finding of Fact # 14, Defendant was in custody. *United States v. Stewart*, 388 F.3d 1079, 1082 (7th Cir. 2004).

5. The term "interrogation" means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Abdulla*, 294 F.3d at 834 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)).

6. In *Oregon v. Elstad*, 105 S.Ct. 1285 (1985), the Supreme Court held that the failure to administer *Miranda* warnings prior to the defendant's initial inculpatory statement did not require the suppression of his subsequent *Mirandized* statement:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings,

> unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely to whether it is knowingly and voluntarily made.

Id. at 1293.

7. More recently, in *Missouri v. Seibert*, 124 S.Ct. 2601 (2004), the Supreme Court "addressed the admissibility of a two-step interrogation strategy that called for the deliberate withholding of *Miranda* warnings until the suspect confessed, followed by a *Miranda* warning and a repetition of the confession already given." *Stewart*, 388 F.3d at 1086.

8. In *Seibert*, the officer who arrested the defendant purposely did not advise her of her *Miranda* rights. The defendant was then transported to the police station where another officer questioned the defendant for

approximately 30-40 minutes without advising her of her *Miranda* rights. *Seibert*, 124 S.Ct. *at* 2606. After the defendant made incriminating statements, she was given a 20-minute break. *Id.* Following the break, the officer advised the defendant of her *Miranda* rights and she executed a written waiver of her rights. *Id.* The defendant then made a statement during which the officer confronted her with her pre-*Miranda* statements. *Id.* The defendant's post-*Miranda* statement was "largely a repeat of information . . . obtained" in the pre-*Miranda* statement. *Id.* (quoting the record on appeal). At the hearing on the motion to suppress the defendant's pre- and post *Miranda* statements, the officer testified that he made "'a conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the *[Miranda]* warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Id.* (quoting the record on appeal). In concluding that the defendant's post-*Miranda* statements were inadmissible under these circumstances, a plurality of the Court found that "the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted," and that the facts did "not reasonably support a conclusion that the *[Miranda]* warnings given could have served their purpose." *Id.* at 2613.

9. Although a plurality of the Court found the defendant's post-Miranda statement inadmissible, *Seibert* did not produce a majority opinion. *Stewart*, 388 F.3d at 1086.

10. In *Stewart*, the Seventh Circuit analyzed the various concurring opinions comprising the plurality to determine *Seibert's* holding. *Id.* at 1086-90. This analysis revealed the following holding: "At least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second." *Id.* at 1090. Under the multifactor test, the court must examine the "completeness and detail of the questions and answers" in the pre-Miranda statement, the "overlapping content" of the pre- and post-Miranda statements, the "continuity of police personnel," and the degree to which the interrogator's questions treated the post-*Miranda* statement as continuous with the pre-Miranda statement, to determine whether the pre- and post-Miranda statements were sufficiently separated for the *Miranda* warnings to have effectively informed the defendant of his constitutional rights. *Seibert*, 124 S.Ct. at 2610, 2612; *Stewart*, 388 F.3d at 1090.

Appendix D

11. The Seventh Circuit's analysis also indicated that "[w]here the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*." *Stewart*, 388 F.3d at 1090. Thus, if the pre-*Miranda* statement was voluntary, admission of the post-*Miranda* statement "depends only on whether it, too, was voluntary, and obtained in compliance with *Miranda*." *Id. at* 1088.

12. The court finds that the Government has met its burden of proving, by a preponderance of the evidence, that the interrogation technique employed by the EPD was not a deliberate end run around *Miranda*. There is no evidence that the EPD has ever had a policy which employs the two-step interrogation technique, nor evidence that the EPD has ever trained or instructed their officers to employ such a technique.

13. In keeping with the Seventh Circuit's interpretation of *Seibert*, the court must determine whether Defendant's pre- and post-*Miranda* statements were voluntary.

14. "[A] confession is voluntary if, in light of the totality of the circumstances, the confession is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive

interrogation tactics that have overcome the defendant's free will." *Abdulla*, 294 F.3d at 836. Further, "coercive police activity is a necessary predicate to the finding that a confession is not voluntary." *Id.*

15. There is no evidence of any coercive police activity relative to Defendant's pre-*Miranda* statement. There is no evidence that he was threatened in any way by the police officers nor is there evidence that anyone made any promises to the Defendant in exchange for speaking with the officers. The court therefore finds, in light of the totality of the circumstances, that Defendant's pre-*Miranda* statement was voluntary.

16. Defendant's *post-Miranda* statement was likewise voluntary. *Stewart*, 388 F.3d at 1092. He executed a written waiver of his *Miranda* rights, which informed him of his right to remain silent, his right to an attorney, his right to exercise his right to remain silent at any time during the interrogation process, and the possible use of his testimony against him at trial. Nelson testified that he read these rights to the Defendant and that he appeared to understand them. Defendant did not ask Nelson for clarification of the waiver provision or of his constitutional rights.

17. For these reasons, the court finds that the interrogation of Defendant was not a deliberate end run around *Miranda*, that Defendant's pre-*Miranda* statement was voluntary in accordance *with Elstad*, and that Defendant's post-*Miranda* statement was taken in compliance with *Miranda*.

SO ORDERED this 29th day of June 2005.

s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED NOVEMBER 9, 2004

UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

No. 03-2377

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY STEWART,

Defendant-Appellant.

Argued Sept. 15, 2004

Decided Nov. 9, 2004

Before EVANS, WILLIAMS, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Timothy Stewart was convicted by a jury of armed bank robbery and use of a firearm during a crime of violence. He confessed to these crimes, but argues that his confession should not have been admitted at trial because the police used a two-step interrogation process in which *Miranda* warnings were initially withheld, in

violation of *Miranda* as applied in the Supreme Court's recent decision in *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). He also claims the confession was involuntary in light of a promise of leniency made by the interrogating officer, and that his trial counsel was ineffective in not moving to suppress the confession as the fruit of an unlawful arrest. Finally, Stewart argues that his trial counsel was ineffective because she did not assert a *Brady* violation or seek a missing evidence instruction regarding the partial erasure of a surveillance videotape of the robbery.

We reject Stewart's various ineffective assistance of counsel claims and also affirm the district court's conclusion that Stewart's confession was not involuntary because of an improper police promise. On the present record, however, we cannot determine whether the admission of Stewart's confession requires reversal under *Seibert*. We therefore remand for further proceedings consistent with this opinion.

I. Background

Ten days before Halloween 2001, the Old National Bank in Evansville, Indiana was robbed by a man dressed in black and wearing a skeleton mask. The robber entered the bank at about 9:30 a.m. carrying an SKS rifle and a duffel bag. He ordered everyone to the ground, leaped over the teller counter, pointed the rifle at one of the tellers, and told her to fill the duffel bag with money. As she did so, another teller activated the bank's alarm. The robber escaped through the rear door

of the bank, where he was seen by an emergency medical technician who had just parked her ambulance and was preparing to go into the bank. The technician saw the robber get into a white car and noticed a red mist billowing inside the car as it headed west away from the bank.

The robber did not stay in the car very long. Evansville Police Officer Michael Sitzman, responding to a dispatch about the robbery, was in his squad car about a block from the bank when he observed a black man carrying a duffel bag and a rifle running from the bank. The man hid briefly behind a parked pickup truck before resuming his flight, scaling a fence, and disappearing from view. Sitzman did not get a look at the man's face, but provided a general physical description to his dispatcher.

About a half-hour after the robbery and roughly a mile south of the bank, Timothy Stewart unexpectedly appeared at a Subway sandwich shop where his sister-in-law Mary Kay Petitjean worked. Stewart asked Petitjean for a ride but did not tell her where he was going. Stewart told Petitjean to drive north in the direction of the bank. In the meantime, Evansville Police Corporal Timothy Nussmeier had established a perimeter a few blocks from the bank and was checking vehicles for a person matching Sitzman's description of the robbery suspect: a black male, about 52 73 tall, 145 pounds, with short hair, and wearing blue coveralls. When Petitjean arrived at the perimeter checkpoint, Nussmeier directed her to pull over.

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Nussmeier observed that Stewart, seated in the front passenger seat, generally matched Sitzman's description of the robbery suspect but was wearing a white shirt and blue pants. Nussmeier asked Stewart who he was, where he was coming from, and where he was headed. Stewart identified himself and told Nussmeier that he and Petitjean had driven from the Subway store and that he had walked to the Subway from 4000 Kathleen Avenue in order to get a ride from Petitjean. Nussmeier was familiar with both locations and knew that the Subway was some twenty-five to thirty blocks from 4000 Kathleen Avenue. Stewart could not give Nussmeier a specific destination, saying only that they were going "up here" or "up this road."

Nussmeier radioed for an eyewitness identification, and Officer Sitzman arrived at the perimeter checkpoint soon after. Because he had not seen the suspect's face, Sitzman could not make a definite positive identification; but as to hairstyle and physical build, he said Stewart was "about a perfect match" with the suspect. Nussmeier radioed for the assistance of Evansville detectives. He handcuffed Stewart and placed him in the back seat of his squad car where Stewart remained for five or ten minutes.

At approximately 10:30 a.m., one hour after the robbery and some twenty minutes after Petitjean's car had been stopped, Evansville Detectives Dan Winters and Larry Nelson arrived at the checkpoint. Winters removed Stewart from Nussmeier's car and uncuffed him. Unprompted, Stewart said, "Let's get in your car."

Stewart got into the back seat of Winters' car and Winters got in the front seat. Stewart then told Winters to "drive" and to "take me downtown." Winters asked him why; Stewart responded, "Well, you're going to arrest me anyway." Winters asked, "Why, are you the bank robber?" Stewart answered "no."

Meanwhile, back at the bank, the white getaway car was found in an alley just west of the bank, driver's door open, keys in the ignition, and a red dye stain in the front passenger side. A cell phone was found on the ground about fifteen to twenty feet from the car. About five or ten minutes after Stewart entered Winters' car, information was relayed to the officers at the perimeter checkpoint that the cell phone recovered near the scene of the crime belonged to one Timothy Stewart of 4000 Kathleen Avenue. Winters then removed Stewart from the car, handcuffed him, and returned him to the back seat. Stewart was not told he was under arrest and no *Miranda* warnings were given, although the parties now agree that at this point Stewart was under arrest.

Detectives Nelson and Winters left the checkpoint with Stewart at about 10:40 a.m. During the five-minute drive to the police station, the detectives questioned Stewart about the robbery. Stewart denied any involvement. When they arrived at the station, Stewart was placed in an interview room and the handcuffs were removed. Nelson and Winters again asked Stewart if he was involved in the robbery. Stewart continued to deny involvement, but asked the detectives if he would be charged if he told them who had committed the

robbery. Nelson told Stewart that he would be "all right" as long as he had no direct involvement in the robbery himself. Stewart then told the detectives that a man named Duel Felders committed the robbery and that he had provided Felders with the gun and the getaway car. The detectives advised Stewart that his cell phone had been recovered; Stewart said Felders had used his phone and must have left it in the car.

About five or ten minutes into the station-house interview, Winters left the room and Nelson and Stewart were joined by FBI Special Agents Martin Williams and James Beck. Shortly thereafter, Stewart broke down in tears and admitted to committing the robbery alone. At that point Nelson advised Stewart of his rights under *Miranda*.[1] At 11:05 a.m. Stewart signed a waiver of rights form. The questioning then continued for over an hour, and Stewart ultimately agreed to make a tape-recorded statement.

Stewart's tape-recorded statement began at 12:10 p.m. and ended at 12:38 p.m. During this statement, Stewart was occasionally asked about admissions made and information provided earlier in the interrogation. For example, early on in the recorded statement, Nelson asked Stewart, "You have admitted to committing that robbery, is that correct," and Stewart answered "yes." Also, referring to Stewart's admission that he stole the getaway car from a car dealership, Nelson asked

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1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Stewart, "You had told us that you had test drove that car," and Stewart answered "yes." It is not clear from the record whether these references to earlier admissions pertain to Stewart's pre- *Miranda* or post-*Miranda* statements to police.

Stewart's trial counsel moved to suppress Stewart's confession, arguing that it was involuntary because he was intoxicated and because the police promised him leniency if he cooperated in the investigation. Although Stewart testified at the suppression hearing that "the FBI guy" told him that he "wouldn't be charged with the gun [offense]" if he cooperated, Agent Williams testified that no such representations or promises of any sort were made. Stewart also testified that he had consumed twelve ounces of Crown Royal that morning, but the officers said he showed no signs of intoxication. The district court found that there was no credible evidence of intoxication or promises of leniency and concluded that Stewart's statements to police following his *Miranda* waiver were voluntary and admissible.

Stewart's taped confession was admitted in evidence and played for the jury during trial. Near the close of the government's case in chief, Stewart's attorney advised the district court that a bank surveillance videotape of the robbery had been partially erased by the prosecutor. Although the videotape was listed on the government's exhibit list, the prosecutor announced his intention not to offer it in evidence, and rested his case. Stewart's attorney said she wanted the videotape admitted, but would like an opportunity to confer with

Stewart first. A recess was taken, and when court reconvened, Stewart's attorney announced that the defense would rest without introducing any evidence. She did not request an evidentiary hearing to determine how the videotape was partially erased, nor did she request a missing evidence jury instruction. The jury returned a guilty verdict on both counts, and Stewart was sentenced to 159 months in prison.

II. Discussion

A. Ineffective Assistance of Counsel

Stewart argues that he was arrested without probable cause and that his trial attorney was ineffective in not moving to suppress his confession as the poisonous fruit of his unlawful seizure. He also argues that counsel was ineffective in failing to move for a *Brady* hearing or request a missing evidence instruction regarding the partially erased videotape.

Sixth Amendment ineffective assistance of counsel claims are often raised collaterally in a petition under 28 U.S.C. § 2255 to allow for supplementation of the record with evidence pertinent to the asserted attorney error. *Galbraith v. United States*, 313 F.3d 1001, 1007-08 (7th Cir.2002); *McCleese v. United States*, 75 F.3d 1174, 1178 (7th Cir.1996). However, where a defendant confines his claim to the existing record and is represented by different counsel on appeal, an ineffective assistance of counsel argument is proper on direct appeal. *McCleese*, 75 F.3d at 1178. That is the case here.

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A defendant claiming that his counsel was constitutionally ineffective is up against a strong presumption that counsel provided adequate assistance and exercised reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674 (1984); *United States v. Pergler*, 233 F.3d 1005, 1009 (7th Cir.2000). The familiar *Strickland* test requires Stewart to show that his attorney's performance was deficient and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052; *Floyd v. Hanks*, 364 F.3d 847, 850 (7th Cir.2004).

1. Fourth Amendment violation

To satisfy the *Strickland* test where the asserted attorney error is a defaulted Fourth Amendment claim, a defendant must first prove that the Fourth Amendment claim is meritorious. *United States v. Jackson*, 103 F.3d 561, 573 (7th Cir.1996). Stewart concedes that his initial stop was justified by reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and also does not challenge his brief detention while Corporal Nussmeier waited for an eyewitness identification. He argues that once Officer Sitzman arrived and failed to positively identify him, the basis for his continued detention was eliminated.

We disagree. The initial suspicion did not dissipate upon Sitzman's arrival at the checkpoint. Stewart matched the suspect's general description, was stopped within a few blocks of the crime scene, and had only a

vague explanation for where he was going. It is true that Sitzman could not make a completely positive identification because he had not seen the suspect's face. But Sitzman declared that Stewart was "about a perfect match" with the suspect's hairstyle and physical build. This heightened rather than eliminated the initial suspicion, justifying Stewart's continued brief detention while detectives were summoned.

Stewart also argues that the level of suspicion did not justify the amount of restraint used when Nussmeier handcuffed him and placed him in the back seat of his squad, an act which Stewart claims transformed the *Terry* stop into a formal arrest. By the time Detective Winters arrived and removed the handcuffs, Stewart had been detained in Nussmeier's squad for about ten minutes.

The fault line between an investigative detention and an arrest is flexible and highly fact-intensive: "Given the 'endless variations in the facts and circumstances,' there is no 'litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop' and becomes an arrest." *United States v. Tilmon*, 19 F.3d 1221, 1224 (7th Cir.1994) (quoting *Florida v. Royer*, 460 U.S. 491, 506, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229 (1983)). "[T]he crux of our inquiry is whether the nature of the restraint imposed meets the Fourth Amendment's standard of objective reasonableness." *United States v. Vega*, 72 F.3d 507, 515 (7th Cir.1995). The permissible scope of a *Terry* stop has expanded in recent years to include the use of handcuffs and temporary detentions in squad cars. *Id.; Tilmon*, 19 F.3d at 1224-25.

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In *Vega* we held that a *Terry* stop did not become an arrest when officers drew their weapons and detained a suspect in a squad car for over an hour. *Vega*, 72 F.3d at 515. We noted that the officers believed the suspect was dangerous and that the circumstances of the case—which involved a "massive" cocaine conspiracy—made the duration and manner of the stop reasonable. *Id.* Similarly, in *Tilmon* we affirmed the reasonableness of a stop of an armed bank robbery suspect in which officers completely surrounded the suspect's car and drew their guns. *Tilmon*, 19 F.3d at 1226.

Common to both *Vega* and *Tilmon* was our recognition of the officers' reasonable belief that the suspect was potentially dangerous. "To require an officer to risk his life in order to make an investigatory stop would run contrary to the intent of *Terry v. Ohio.*" *Id.* at 1226 (quoting *United States v. Maslanka*, 501 F.2d 208, 213 n. 10 (5th Cir.1974)). Similar considerations are at work here. The bank robbery was less than an hour old, and Stewart matched the best description of the suspect that the officers possessed. The robbery suspect wielded a semiautomatic rifle and committed a crime of violence. Stewart behaved suspiciously, giving a vague and implausible story about where he had come from and where he was going.

Under these circumstances, it was not unreasonable for the officers to handcuff and detain Stewart in the squad car for ten minutes pending the arrival of detectives; their action in this regard did not transform

Stewart's temporary detention into an arrest.[2] A motion to suppress Stewart's confession as the fruit of an illegal arrest would have failed on the merits. Stewart's counsel cannot have been ineffective for failing to pursue what we have concluded would have been a meritless suppression motion. *Jackson*, 103 F.3d at 573.

2. *Brady* claim and "missing evidence" instruction

Stewart also argues that his attorney's performance was deficient because she failed to assert a *Brady* violation or request a "missing evidence" jury instruction regarding the partial erasure of the surveillance videotape. A claim that the government failed to preserve evidence is not governed by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) but, rather, by the more rigorous standard established in *Arizona v. Youngblood*, 488 U.S. 51, 56-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). This requires the defendant to demonstrate: "(1) bad faith on the part of the government; (2) that the exculpatory value of the

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2. Stewart also briefly suggests that his detention became illegal once the detectives arrived because they had information from certain witnesses at the bank that the robber was six-feet tall. Stewart claims he should have been released because he is only 52 73 . But when the detectives arrived, they removed Stewart from the squad car and also removed the handcuffs; it was Stewart *himself* who then asked to get in Detective Winters' car and be taken downtown. He was not handcuffed again until a few moments later when the detectives learned that his cell phone had been found at the scene. At this point (the parties agree), Stewart was under arrest based on adequate probable cause.

evidence was apparent before the evidence was destroyed; and (3) that the evidence was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *United States v. Aldaco*, 201 F.3d 979, 982-83 (7th Cir.2000) (quoting *United States v. Watts*, 29 F.3d 287, 289-90 (7th Cir.1994)).

On this aspect of his ineffective assistance of counsel claim Stewart is boxed in by his election to assert the claim on direct review rather than in a § 2255 collateral proceeding. There is no evidence in the record about the circumstances surrounding the partial erasure of the videotape, the content of what was erased, and the nature and quality of the images that remained on the tape. We have no record upon which to evaluate the defense attorney's decision to abandon the issue of the partially erased videotape. The record reflects only that she raised the subject of the videotape with the district court when the government rested its case, and then asked for a recess to confer with Stewart. When court resumed, Stewart's attorney rested the defense case without introducing any evidence. Without a supplementary evidentiary record, Stewart cannot carry his burden of demonstrating that his attorney mishandled the issue of the videotape.

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B. *Miranda* Violation and Voluntariness of Confession

Stewart argues that his confession should have been suppressed for two additional reasons: (1) the police used a two-step interrogation process in which *Miranda* warnings were initially withheld, in violation of *Miranda* and the Supreme Court's recent decision in *Missouri v. Seibert;* and (2) the confession was involuntary because it was induced by a promise of leniency. The latter argument is perfunctory and meritless. Stewart claims he was duped into initially confessing "indirect" and then "direct" involvement in the robbery by Detective Nelson's representation that he would not be charged if he had no direct involvement in the crime. The detective's offhand remark that Stewart would be "all right" if he had no direct involvement in the robbery cannot reasonably be construed as a promise of leniency and was not otherwise coercive.

Stewart's challenge to the two-step interrogation is not so easily resolved. The parties agree that Stewart was in custody when he was handcuffed and returned to the back seat of Detective Winters' car after the detectives learned that the cell phone recovered at the crime scene belonged to him. *Miranda* warnings were not given, but Stewart was questioned by police during the five-minute ride to the police station, and the questioning continued in an interview room at the station for another ten minutes or so. During this unwarned phase of the interrogation, Stewart initially denied involvement, then admitted to assisting the

perpetrator (to the extent of providing the gun and the getaway car), and then confessed to robbing the bank alone. At this point the police provided *Miranda* warnings, obtained a waiver of rights, and elicited a detailed confession which was subsequently tape-recorded.

Although he did not raise the issue in the district court, Stewart argued in his opening brief on appeal that the police violated *Miranda* when they elicited an unwarned confession and then, mid-interrogation, interjected *Miranda* warnings and secured a postwarning repetition of his confession. His position on this issue was considerably strengthened when the Supreme Court decided *Missouri v. Seibert* while this appeal was being briefed. At issue in *Seibert* was the admissibility of a confession obtained by the use of a two-step interrogation strategy that called for the deliberate withholding of *Miranda* warnings until the suspect confessed, followed by a *Miranda* warning and a repetition of the confession already given.

The interrogating officer in *Seibert* testified that he made a "conscious decision" to use "an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.' " *Seibert*, 542 U.S. at __, 124 S.Ct. at 2606. Although five members of the Court held the postwarning confession inadmissible under these circumstances, the case did not produce a majority opinion. "When a fragmented Court decides a case and no single rationale explaining

the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); *see also Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 715 n. 20 (7th Cir.2003). A close reading of the separate opinions in *Seibert* reveals at least some common legal ground.

A plurality of the Court held that *Miranda* warnings given mid-interrogation, after a suspect has already confessed, are generally ineffective as to any subsequent, postwarning incriminating statements.[3] *Seibert*, 542 U.S. at __, 124 S.Ct. at 2605. The plurality held that the police interrogation technique known as "question first" did not serve *Miranda* 's purpose of informing suspects about their constitutional rights: "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Seibert*, 542 U.S. at __, 124 S.Ct. at 2610. When police question first and warn later, the threshold inquiry, according to the plurality, is "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Id.* The plurality was skeptical: "[I]t is likely that if the interrogators employ the

3. Justice Souter wrote the plurality opinion and was joined by Justices Stevens, Ginsburg, and Breyer.

technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* This is because a suspect who had just admitted guilt "would hardly think he had a genuine right to remain silent." *Id.* at 2611.

The plurality distinguished *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), essentially limiting it to its facts. *Id.* at 2611-12. *Elstad* addressed the admissibility of a *Mirandized* station-house confession that was preceded by an earlier, unwarned inculpatory remark by the defendant at the scene of his arrest. The defendant in *Elstad* was arrested at his home in connection with a recent neighborhood burglary. As police were executing the arrest warrant, and while still in the defendant's living room, one of the officers explained to the defendant that he was suspected of being involved in burglarizing his neighbor's home. *Elstad*, 470 U.S. at 301, 105 S.Ct. 1285. The defendant told the officer, "Yes, I was there." *Id.* He had not yet received *Miranda* warnings. Later, at the sheriff's headquarters, the defendant was fully *Mirandized*, waived his rights, and gave an incriminating statement. *Id.*

The Supreme Court held in *Elstad* that the failure to administer *Miranda* warnings prior to the defendant's initial inculpatory statement did not require suppression of his subsequent *Mirandized* confession. *Elstad*, 470 U.S. at 300, 105 S.Ct. 1285. Because the

Fourth Amendment exclusionary rule is different in purpose and effect from the *Miranda* suppression rule, the Court refused to extend the Fourth Amendment "fruits" doctrine to the Fifth Amendment *Miranda* context:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Id. at 310, 105 S.Ct. 1285.

The Court also refused to attribute constitutional significance to the "psychological effects" of a voluntary unwarned admission, reiterating that "[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." *Id.* at 310-11, 105 S.Ct. 1285. If a prior statement has actually been coerced, "the time that passes between confessions, the change in place of

interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over to the second confession." *Id.* at 310, 105 S.Ct. 1285. However, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion" as to the second statement. *Id.* at 314, 105 S.Ct. 1285. Where the initial unwarned statement was voluntary, the admissibility of the second statement depends only on whether it, too, was voluntary, and obtained in compliance with *Miranda*. *Id.* at 318, 105 S.Ct. 1285. Thus, "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.*

The *Seibert* plurality followed *Elstad* to the extent that it rejected application of the Fourth Amendment "fruits" doctrine to the testimonial fruits of a *Miranda* violation.[4] *Seibert*, 542 U.S. at __ n. 4, 124 S.Ct. at 2610 n. 4. However, the plurality distinguished the police conduct at issue in *Elstad* from the deliberate use of a question-first interrogation strategy: "Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith

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4. In *United States v. Patane*, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004), released with *Missouri v. Seibert*, the Supreme Court held that the failure to give *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements.

Miranda mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." *Id.* at 2612. The plurality characterized the facts in *Seibert* as presenting "the opposite extreme . . . which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings."[5] *Id.* The plurality distilled from these extremes a list of factors that may inform a court's judgment on whether mid-interrogation *Miranda* warnings are effective in individual cases:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

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5. The plurality emphasized that its conclusion in this regard did not turn on the subjective intent of the officer: "[b]ecause the intent of the officer will rarely be as candidly admitted as it was here . . . the focus is on facts apart from intent that show the question-first tactic at work." *Seibert*, 542 U.S. at __ n. 6, 124 S.Ct. at 2612 n. 6.

Id. at 2612. Applying these factors to the case before the Court, the plurality concluded that the delayed *Miranda* warnings were ineffective and the statements made after they were delivered were inadmissible. *Id.* at 2613.

Justice Breyer wrote separately to state his preference for a "fruits" rule and a good-faith exception to two-stage interrogations: "Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." *Seibert*, 542 U.S. at __, 124 S.Ct. at 2613 (Breyer, J., concurring). He joined the plurality in full, however, predicting that "the plurality's approach in practice will function as a 'fruits' test," in that the "truly 'effective' *Miranda* warnings on which the plurality insists . . . will occur only when certain circumstances—a lapse in time, a change in location or interrogating officer, or a shift in the focus of the questioning—intervene between the unwarned questioning and any postwarning statement." *Id.*

Justice Kennedy also concurred, but took a different approach to the analysis of *Mirandized* confessions that follow unwarned incriminating statements. Justice Kennedy viewed the plurality's test for admissibility as too broad, calling for a multifactor objective inquiry into the "effectiveness" of midstream *Miranda* warnings in all cases involving two-stage interrogations. *Seibert*, 542 U.S. at __, 124 S.Ct. at 2614 (Kennedy, J., concurring). He rejected the general proposition that a *Miranda* violation in connection with one statement necessarily threatens the admissibility of other statements taken

in full compliance with *Miranda:* "[I]t would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." *Id.* at 2615.

Justice Kennedy narrowed the focus to the *deliberate* circumvention of *Miranda.* "The *Miranda* warning was withheld [from Seibert] to obscure both the practical and legal significance of the admonition when finally given." *Id.* He favored the following rule: "When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps." *Id.* The sufficiency of the curative measures would depend upon their capacity to "ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning." *Id.* at 2616. Justice Kennedy suggested that "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id.* He added that providing the suspect with an explanation of the likely inadmissibility of the unwarned statement "may be sufficient" as a curative measure. *Id.*

Justice Kennedy made it clear, however, that he would apply this test "only in the infrequent case, such

as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.* That is, "[t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." *Id.* On the facts before the Court, he concluded that the question-first tactic represented an "intentional misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use." *Id.* at 2615. Because no curative steps were taken, Justice Kennedy joined the plurality in concluding that the defendant's postwarning statement was inadmissible. *Id.* at 2615-16.

Justice O'Connor dissented in *Seibert*, joined by Chief Justice Rehnquist and Justices Scalia and Thomas. The dissenting justices would have evaluated the two-step interrogation under the voluntariness standard established in *Elstad*. "*Elstad* commands that if Seibert's first statement is shown to have been involuntary, the court must examine whether the taint dissipated through the passing of time or a change in circumstances." *Seibert*, 542U.S. at __, 124 S.Ct. at 2619 (O'Connor, J., dissenting). Under *Elstad*, if the first statement was voluntary (or if involuntary, the change in time and circumstances removed the taint), then the second statement is admissible unless it was involuntary despite the *Miranda* warning. *Id.*

What emerges from the split opinions in *Seibert* is this: at least as to *deliberate* two-step interrogations in

which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second. According to the plurality, the multifactor test-timing and location of interrogations, continuity of police personnel, overlapping content of statements, etc.—measures the "effectiveness" of midstream *Miranda* warnings and applies in all cases involving sequential unwarned and warned admissions. In Justice Kennedy's view, however, an inquiry into change in time and circumstances between the prewarning and postwarning statements—what he called "curative steps"—is necessary only in cases involving the deliberate use of a two-step interrogation strategy calculated to evade the requirements of *Miranda*. Justice Kennedy thus provided a fifth vote to depart from *Elstad*, but only where the police set out deliberately to withhold *Miranda* warnings until after a confession has been secured. Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*.

As we have noted, Stewart did not raise the two-step interrogation argument in the district court. This forfeiture means we review the district court's admission of the postwarning confession for plain error. *United States v. Olano*, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Westmoreland*, 240 F.3d 618, 635 (7th Cir.2001). We will not correct a

forfeited error unless it is "plain" (that is, clear under current law) and affects substantial rights, which usually equates to a finding of prejudice. *Olano*, 507 U.S. at 732-34, 113 S.Ct. 1770. Satisfaction of this standard permits but does not require reversal. We will exercise remedial discretion to correct a plain forfeited error affecting substantial rights only when "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Olano*, 507 U.S. at 736, 113 S.Ct. 1770. An error may be "plain" for purposes of the *Olano* test if it is clear at the time of appellate review: "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that the error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

Seibert was decided while this appeal was being briefed. Both parties cited and analyzed the case—Stewart in his reply brief, the government by supplemental submission—and discussed it during oral argument. If Stewart's post-warning confession was inadmissible under either *Seibert* or what remains of *Elstad* (more on this in a moment), then its use against him at trial was plain error under *Johnson*, 520 U.S. at 468, 117 S.Ct. 1544 ("it is enough that the error be 'plain' at the time of appellate consideration").

We also conclude that the error—if there was one—affected Stewart's substantial rights. A confession is powerful evidence in any case; in the circumstances of this case, the admission of the confession was clearly

prejudicial. Stewart confessed in considerable detail, explaining how he stole the getaway car, acquired the rifle from an illegal gun seller in Kentucky, and bought the clothing and skeleton mask at local discount stores. He provided a thorough description of his actions before, during, and after the robbery. The tape-recorded confession was played for the jury and a transcript provided so jurors could better follow what Stewart is heard saying on the tape. The confession most certainly had a profound effect on the verdict. There was other evidence against Stewart, to be sure: the partial identification by Officer Sitzman; his cell phone at the crime scene; his strange story of having walked twenty-five blocks to get a ride to nowhere. Still, the admission of Stewart's taped confession substantially affected the outcome of the trial; if it was admitted improperly, it seriously affected the fairness and integrity of the trial.[6]

On the record before us, however, we cannot determine whether the admission of Stewart's confession was improper under *Seibert*, or, if not improper under *Seibert*, whether the initial unwarned confession would flunk the voluntariness standard of

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6. Stewart also suggests, quite summarily, that his counsel's forfeiture of the two-step interrogation issue in the district court constituted ineffective assistance of counsel. But "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law." *Valenzuela v. United States*, 261 F.3d 694, 700 (7th Cir.2001) (quoting *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir.1993)). We cannot fault Stewart's counsel for not predicting the Supreme Court's split decision in *Seibert*.

Elstad such that the taint would carry over to the second warned confession. More specifically, the record does not speak to whether the two-step interrogation in this case was deliberately used in circumvention of *Miranda*. If it was, then the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge, requiring an inquiry into the sufficiency of the break in time and circumstances between the unwarned and warned confessions.

Much of this evidence is already in the record, and it does not point to a separation of time and circumstances between the two confessions. We know, for example, that the unwarned questioning occurred in the squad car on the way to the police station, continued at the station, and was conducted primarily by Detective Nelson, initially with the assistance of Detective Winters and then two FBI agents. We know that it was Nelson who delivered the *Miranda* warnings and continued the interrogation after Stewart's waiver. But the record does not include the content of the hour-long postwarning interrogation that preceded the tape-recorded confession or the actual content of Stewart's unwarned confession. We therefore can only speculate about the extent to which the three statements overlap and the extent to which the questions treated the interrogation as continuous, although continuity and overlap seem likely. If the sequential interrogation process was used in deliberate circumvention of *Miranda* and there is insufficient separation in time and circumstances between the unwarned and warned confessions, then the warned confession was improperly

admitted and Stewart's conviction cannot stand. *Cf. United States v. Aguilar*, 384 F.3d 520, 2004 WL 2026780 (8th Cir.2004) (treating the plurality in *Seibert* as the decision of the Court but finding enough evidence in the record to determine violation of *Miranda* under both the plurality opinion and Justice Kennedy's concurrence.)

If, on the other hand, the interrogation process at work here was not a deliberate end run around *Miranda*, then Stewart's first statement must be evaluated for voluntariness under *Elstad*. If involuntary, then the same sort of inquiry into change in time and circumstances between the first and subsequent statements will determine whether Stewart's tape-recorded confession was properly admitted.

III. Conclusion

Accordingly, for the foregoing reasons, we AFFIRM the district court's conclusion that Stewart's postwarning confession was voluntary, and reject Stewart's claims of ineffective assistance of counsel. On the issue of the admissibility of the confession under *Missouri v. Seibert*, we REMAND the case to the district court for further proceedings consistent with this opinion.